**MINUTES**
**NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION**
**REVIEW COMMITTEE**
**FIFTH MEETING: SEPTEMBER 20 - 22, 1993**
**WASHINGTON, D.C.**

The fifth meeting of the Native American Graves Protection and Repatriation Review Committee was called to order by Ms. Tessie Naranjo at 8:30 a.m., Monday, September 20, 1993 at the Maritime Commission Hearing Room, 800 North Capitol Street, NW, Washington, DC The following Review Committee members, staff, and others were in attendance:

Members of the Review Committee:
- Ms. Tessie Naranjo, Chair
- Ms. Rachel Craig
- Mr. Jonathan Haas
- Mr. Dan Monroe
- Mr. Martin E. Sullivan
- Mr. William Tallbull
- Mr. Phillip L. Walker

National Park Service staff present:
- Mr. Francis P. McManamon, Departmental Consulting Archeologist, Washington, DC
- Ms. Veletta Canouts, Data Preservation Team Leader, Washington, DC
- Mr. C. Timothy McKeown, NAGPRA Program Leader, Washington, DC
- Mr. Hugh (Sam) Ball, Archeologist, Washington, DC
- Ms. Mandy Murphy, intern, Washington, DC
- Ms. Sylvia Yu, intern, Washington, DC
- Mr. Jerry Rogers, Associate Director for Cultural Resources, Washington, DC
- Ms. Patricia Parker, Coordinator for Tribal Preservation Programs, Washington, DC

The following were in attendance during some or all of the proceedings:

- Mr. Raymond Apodaca, Chairman of the Human and Religious Rights Committee for the National Congress of American Indians, El Paso, TX
- Ms. Donna Augustine, Micmac Tribe, New Brunswick, Canada on behalf of the Aroostook Band of Micmacs, ME
- Ms. Marcia Cronan, Special Agent, Division of Law Enforcement, Branch of Investigation, Fish & Wildlife Service, Washington, DC
- Ms. Ernestine Ducheneaux, Ducheneaux, Taylor & Associates, Washington, DC
- Ms. Karen Funk, attorney, Hobbs, Straus, Dean & Wilder, Washington, DC
- Mr. Lars Hanslin, Solicitor's Office, Department of the Interior, Washington, DC
- Ms. Suzan Shone Harjo, President of the Morning Star Institute, Washington, DC, and Chairwoman of the Program Planning Committee for the National Museum of the American Indian, Washington, DC
- Mr. Scott Keep, Assistant Solicitor for Tribal Government and Alaska, Division of Indian Affairs, Solicitor's Office, Department of the Interior, Washington, DC

Ms. Naida Lefthand, delegate from the Confederated Salish and Kootenai Tribes of Pablo, MT
Mr. Tim Mentz, Sr., Tribal Council member, Standing Rock Sioux Tribe, Fort Yates, ND
Mr. Darrell Newell, Passamaquoddy Tribe, ME.
Ms. Deborah Osborne, Federal Energy Regulatory Commission, Washington, DC
Mr. Frank Shoemaker, Special Agent in Charge of Investigations, Fish & Wildlife Service, Washington, DC
Mr. Daniel Weiner, outside counsel for the American Museum of Natural History, New York, N.Y.
Mr. Frank E. Wozniak, NAGPRA Inventory Coordinator for the Southwestern Region, U.S. Forest Service, Albuquerque, NM
Ms. Pemina Yellow Bird, Three Affiliated Tribes, Fort Berthold Reservation, ND

Ms. Naranjo welcomed everyone to the meeting and asked that the Review Committee and National Park Service staff introduce themselves. Ms. Naranjo noted that the meeting was open to the public and had been announced in the *Federal Register*. After the introductions Mr. William Tallbull gave the invocation.

Mr. Jerry Rogers, National Park Service Associate Director for Cultural Resources, welcomed the Review Committee to their fifth meeting and gave a brief overview of the Committee's accomplishments since their first meeting in May, 1992. Mr. Rogers complimented the Committee on their integrity and thoughtfulness and asked that they continue their good work as the regulations are moved toward their final form.

**Review of the Agenda**

Mr. Francis McManamon welcomed the Review Committee and members of the public to the meeting and went on to thank the organizations hosting the reception being held that evening in honor of the Review Committee. These included the American Association of Museums, the Society for American Archeology, the Native American Rights Fund, the Association of American Universities, the Society for Historical Archeology, and the National Conference of State Historic Preservation Officers.

Mr. McManamon explained that the agenda was structured to allow in depth discussion of the written comments that had been received on the proposed regulations. He hoped the Committee would be able to produce a set of recommendations to the Secretary. He also suggested that the Committee could discuss the draft dispute resolution procedures, if time permitted.

Mr. McManamon then reported on the activities of the Archeological Assistance Division over the previous months, including drafting the proposed regulations, reviewing the comments thereon, revising the proposed regulations in response to the comments, preparing the Review Committee's 1992 Report to Congress, drafting grant information and applications, and disseminating information through speaking engagements or printed materials.

**Review of Comments on Proposed Regulations**

Mr. Timothy McKeown provided an introductory overview of the comments received on the proposed regulations. Eighty-two comments, representing 89 organizations or individuals, were received. The comments included letters representing 13 tribes, 10 other Indian organizations, 9 museums, 3 national scientific/museum organizations, 7 universities, 11 state agencies, 19 Federal agencies, and 17 other private individuals or organizations. Comments generally fell into four categories: 1) typographical/grammatical errors; 2) misunderstandings; 3) substantive disagreements with the regulatory text; and 4) substantive disagreements with the statutory text. Mr. McKeown indicated that all of the first type, and many of the second and third type comments, were used to modify the proposed text. The fourth type of comments were not dealt with.

**Discussion of the Proposed Regulations**

*§10.1 Purpose and Applicability*

No changes to this section were proposed.

*§10.2 Definitions*

"Federal Agency" [§10.2(a)(4)]. Mr. McKeown recommended that the word "stipulated" be changed to "specified." Mr. Monroe asked if a sentence might be added indicating that repatriation activities at the Smithsonian Institution, which is specifically excluded under NAGPRA, are mandated by the National Museum of the American Indian Act. Mr. McKeown agreed the information was important but explained that statements of an informational nature are best placed in the Preamble.

"Federal Agency Official" [§10.2(a)(5)]. Mr. McKeown proposed amending this definition to read "means an individual authorized by delegation or authority within a Federal agency to perform the duties relating to these regulations." The Committee agreed to the revision.

"Indian Tribe" [§10.2(a)(9)]. Mr. McKeown recommended that all explanatory text starting with the phrase "Groups that wish to determine if they qualify as Indian tribes..." be deleted from the regulations and inserted in the Preamble. Mr. Walker concurred, say that he found the explanatory material to be insulting to Native Americans.

Mr. Monroe requested a discussion of the definition of "Indian tribe" because he felt the original legislation did not intend to restrict the tribes involved to only those with Federal recognition. Mr. McKeown replied that the legislative history, as evidenced by the House and Senate reports, showed that the definition had been taken from other legislation. Mr. Monroe disagreed and said that he, as a member of the group who had advised Congress during the drafting of the legislation, had not intended to restrict tribal participation.

Ms. Naranjo stated that she found the current statutory definition troubling in that it excluded some Native American groups that should be legitimately considered. Mr. Haas and Mr. Walker agreed,

stipulating that the problem would be particularly acute in California where there were many such unrecognized groups.

Mr. Haas continued that much of the problem grew from the fact that NAGPRA requires museums and Federal agencies to proactively notify all Indian tribes that might be culturally affiliated with human remains or cultural items in their collections. In order to comply with the notification requirement, museums and Federal agencies must have a list of Indian tribes before consultation begins. What Mr. Haas referred to as the "first come, first served" repatriation policies of both the National Museum of the American Indian and the National Museum of Natural History made such a list less important to them.

Mr. McKeown indicated that the current listing of NAGPRA contacts for the 761 Federally recognized tribes had taken nearly a year to compile, largely due to administrative differences within the Bureau of Indian Affairs regarding Alaska villages and corporations. Mr. Haas questioned the feasibility of creating a more inclusive list in time for museums and Federal agencies to comply with the November 16, 1993 deadline for completing summaries of their collections. Mr. Walker agreed that a change of the list at such a late date could cause chaos among the museum community but, he agreed that the law was not intended to limit the tribes to those who were Federally recognized.

Mr. Monroe characterized the discussion as being between what was right and what was expedient. The spirit of the law would not be maintained if the regulations continued to exclude Indian people that had historically been excluded again and again. He said it was hard for him to accept the argument that because it took so long to get the first list from the Bureau of Indian Affairs, the Committee shouldn't recommend the right thing and expand the list. It was his understanding that the additional information would not be that hard to procure. He conceded that certain provisions might need to be added to the regulations to accommodate for a change at such a late date. In his opinion, the primary stumbling block was the Department of the Interior's concern about the precedent of such an action.

Ms. Naranjo agreed that the clause should be embracing rather than excluding and added that she had a particular problem with the BIA being responsible for determining whether someone was an Indian or not. Ms. Craig also voiced her concern with allowing the BIA to determine if a tribe was qualified. She stated that not having Federal recognition had not stopped Indians from being born or dying. Neither had it stopped other people from taking their bones.

Mr. Haas stated that one alternative would be to retain the present definition but, also add a statement encouraging museums and Federal agencies to consult with additional Native American groups. Mr. Tallbull agreed that such a compromise might work. Mr. Lars Hanslin concurred that such an admonition would be possible. Mr. Sullivan agreed, but cautioned that museums could not be expected to notify newly added groups by the November 16th deadline. The challenge, he thought, would be to craft appropriate language to broaden the definition while making it clear that the primary basis for inclusion needed to be one of cultural heritage. He felt that if the Secretary and the Solicitor's Office insisted on the narrow definition, the Committee should officially register its disagreement.

Mr. Hanslin responded by saying it would be perfectly appropriate for the Committee to recommend a broader definition. Mr. Haas challenged Mr. Hanslin's statement, recollecting that discussions of the issue at the Fort Lauderdale meeting had included a strong argument from the Solicitor for limiting the definition to the BIA interpretation. This information had subsequently been disseminated to the entire museum community. Mr. Haas considered such "wishy-washiness" at this late date extremely detrimental as the definition had been discussed *ad nauseam* at earlier meetings. Mr. Hanslin explained that the preliminary views of the Department of the Interior were that as a matter of law, not policy, the list should be limited. The real dilemma, according to Mr. Hanslin, stemmed from the fact that neither the statute nor the legislative history suggested a broader list. Regulations can only clarify Congressional intent, even if the Committee and the Secretary do not agree. Mr. Monroe asked if a letter from the Chairman of the Senate Select Committee might help alleviate the problem. Mr. Hanslin replied an individual Congressman's recollections cannot change the written legislative history, although such information might be useful to the Secretary. Mr. Monroe disagreed with Mr. Hanslin's interpretation of the legislative history which he found to be neutral regarding the definition of Indian tribe. Mr. Hanslin explained that legislative intent is determined first by looking at the language of the statute itself. Only if there is some ambiguity in the statute are the House and Senate Committee reports reviewed. Finally, if Congressional intent is still ambiguous, the initial bills, amendments and hearing record can be reviewed. Mr. Hanslin continued that the definition of Indian tribe in one of the earlier versions of the bill had referred to the definition in the Indian Self-Determination Act and the statute simply quoted that definition. The Indian Self-Determination Act definition has been interpreted by the Bureau of Indian Affairs to mean the tribes on their list. Further, Section 12 of NAGPRA states that the Act "reflects the unique relationship between the Federal government and Indian tribes . . ." Such a government-to-government relationship that extends only to those governments recognized by our the U.S. government.

Mr. Monroe raised his concern that the Department would follow its own agenda in redrafting the Final Regulations and would not take the Committee's recommendations into account. Mr. McManamon explained that the Department will redraft the regulations, taking the Committee's recommendations into account, and send the document to the Departmental Assistant Secretaries and the Solicitor for review and approval. The document will then go to the Secretary of the Interior for his review and signature. It was Mr. McManamon's understanding that the definition of Indian tribe, along with several other issues, would come under scrutiny. Mr. Monroe asked why. Mr. McManamon responded that it was his understanding that the recognition of a group by the Department of the Interior or the BIA brought a variety of benefits. Mr. Monroe asked if the Department of the Interior had one standard definition of Indian tribe. Mr. McManamon responded that he understood the Department did, but continued that he thought it might be possible to craft a broader definition for the purposes of NAGPRA. He advised the Committee to make a specific recommendation as to a broader definition so that it could be incorporated into the revised version of the proposed regulations or sent to the Secretary as an alternative. Mr. McManamon added that no one had really been happy with the definition of "Indian tribe" at the Fort Lauderdale meeting and so the Preamble of the proposed regulations had specifically asked for comments on the definition because some tribes not currently recognized by the BIA should be included and, on the other hand, there are also tribes or fringe groups where the question is less clear. Mr. McManamon saw the problem as how and where to draw the line.

Mr. Haas proposed an alternative interpretation of the statutory language which would include the BIA list as well as other groups who are able to demonstrate eligibility for the special programs and services provided by the U.S. because of their status as Indians. Mr. Haas particularly wanted to include those groups who were not recognized by the BIA, who did not want to be recognized by the BIA, but never-the-less, met all the other criteria. Mr. Hanslin interjected that Mr. Haas' expanded interpretation of the definition begged the question of who would be responsible for deciding whether a group was eligible or not. Mr. McManamon concurred that someone would have to be responsible for determining if a group was eligible and requested the members to comment on the palatability of erecting yet another process for recognizing Indian tribes. Mr. Monroe objected to Mr. McManamon's request, stating that he wanted to keep the discussion focused on the issue of participation first and figure out the process later. Ms. Craig, Ms. Naranjo, and Mr. Sullivan stated that they felt better about using the BIA list as a starting point with the possibility of additions.

Mr. Monroe asked if Mr. Haas' expanded interpretation would allow for terminated tribes to be included. Mr. Haas responded that Mr. Jack Trope, an attorney with the Association for American Indian Affairs, had recommended that terminated tribes not be automatically included, as the reasons for their terminations were complex and varied. Mr. Monroe asked if the BIA had a list of tribes under consideration to become recognized. Mr. McKeown replied that approximately 100 tribes were currently seeking recognition from the BIA. Mr. Monroe asked for copies of the list of tribes seeking recognition and those that had been terminated. The Committee then adjourned to provide the members with time to review the various lists.

Mr. Monroe made a statement when the Committee reconvened. He stated that the Committee shared "the concerns of those opposed to limiting the Act's applicability to only those tribes recognized by the Bureau of Indian Affairs" and was "unanimously and strongly opposed to a policy of exclusion." He continued that the Act "was not created to apply only to a specific group of Native Americans, it was created to apply to all Native Americans" and cautioned that by "limiting participation in NAGPRA, the fundamental goals and purposes of the Act will be substantively diminished." Mr. Monroe added that the Department of the Interior had elsewhere defined "Indian tribe" in several ways, including some definitions that formally included state-recognized tribes. He continued that a Federal court, in Abenaki Nation v. Hughs, had ruled that the NAGPRA definition of "Indian tribe" clearly included tribes other than those recognized by the BIA. Mr. Monroe concluded that the Committee "strongly and forcefully recommends a broad interpretation of the definition of "Indian tribe" within NAGPRA regulations."

Following Mr. Monroe's statement, Mr. Scott Keep, Assistant Solicitor for Tribal Government and Alaska within the Indian Affairs division of the Solicitor's Office, was invited to provide the Committee a brief history of the definition of "Indian tribe." He explained that in the early 1970s, many tribes were petitioning for recognition but, the Department did not have procedures in place to determine the merit of the petitions. At that time, the courts established that the Department might have obligations to a tribe even if the tribe was not officially "recognized." Consequently, the Department produced regulations (25 CFR Part 83) for determining if a group of Indians was indeed an Indian Tribe and a list was published, in the *Federal Register*, of all tribes which met the criteria. The combination of court cases and promulgation of regulations for recognizing tribes raised the question of encroachment on state jurisdiction because Indian tribes have certain privileges, immunities and responsibilities due to their status as Indians.

Mr. Monroe asked Mr. Keep to explain the Department's reservations regarding the Committee's desire to expand the NAGPRA definition of "Indian tribe." Mr. Keep considered it a matter of Congressional intent, explaining that Congress could have broadened the definition if they wanted to, as they had done in the Indian Arts and Crafts legislation. Since Congress used language from a statute where the term was narrowly defined, they must have been willing to accept the consequences. He added that the Committee might consider making a recommendation to Congress that the definition be changed.

Following Mr. Keep's presentation, Mr. Monroe stated that it appeared to him while the Committee's efforts to expand the definition of Indian tribe were well-intentioned, they were probably not wise. He went on to recommend that the Committee stick with the statutory language in the regulations and present a separate statement to the Secretary which argued that the definition should extend beyond Federally recognized tribes to tribal groups that are eligible for Federal services because of their status as Indians. He also recommended that the Committee ask the Department to compile a list of other tribes who receive funds from Federal agencies and that list, plus the BIA list, should be the list for the purposes of NAGPRA. Mr. Monroe felt that if the regulations were modified to include notification of additional tribes, technical assistance would have to be provided to museums or Federal agencies to resolve any confusion over a tribe's status. Mr. Hanslin replied that there was nothing in either the regulations or the statute which precluded a museum or Federal agency from contacting and consulting with tribes which were not Federally recognized, the only problem would occur when the time came to actually repatriate objects or remains.

Mr. McKeown asked for a clarification of the Committee's recommendation as it pertained to Alaska. The statutory language included Alaska Native villages as defined under the Alaska Native Claims Settlement Act. The proposed regulations read "any Alaskan Native village or corporation." Mr. Hanslin stated that the Department had agreed to the inclusion of the Alaska Native corporations in the proposed regulations even though they were not mentioned in the statute and, in his opinion, there was no reason to remove them. The Committee agreed that the definition of "Indian tribe" was to follow statutory language with the explicit addition of Alaska Native corporations.

Mr. Frank Wozniak, NAGPRA Inventory Coordinator for the Southwest Region, US Forest Service, asked Mr. Monroe, as a participant in the development of NAGPRA legislation, if they understood Congressional intent to be an inclusive definition of Indian tribe, why that understanding was not incorporated into the statute itself. Mr. Monroe replied that they had been so involved with trying to bring all the issues together and reach some sort of compromise that they lost track of what was right.

Ms. Naida Lefthand from the Confederated Salish and Kootenai Tribes of Pablo, Montana, voiced her concerns about changes in the definition of "Indian tribe." Ms. Lefthand shared with the Committee her family's dealings with the BIA's Acknowledgment Section and explained that people are unable to make the BIA's enrollment list even though they are Indians and know the language and the traditions. Ms. Lefthand wanted Indian people to decide who should be included under the definition of Indian tribe.

Ms. Suzan Harjo, President of the Morning Star Institute and Chairwoman of the Program Planning Committee for the National Museum of the American Indian, commented that the Committee had a responsibility to go beyond the arbitrary definition of "Indian tribe." She contended there are many

definitions of "Indian tribe" used by the U.S. government. She asserted the Department of the Interior currently deals with non-Federally recognized tribes, including those that are state-recognized, under the Indian Arts and Crafts Act Amendments of 1990 although, she admitted the Arts and Crafts Board list contained some questionable entities. Ms. Harjo also reported California was investigating the cases of tribes which had negotiated treaties that had never been ratified by the Senate.

In Ms. Harjo's opinion, the statutory requirement to deal with traditional religious leaders includes all religious leaders, whether belonging to a Federally recognized tribe or not. She asked the Committee to consider how many tribes would have been outside the current definition of "Indian tribe" if NAGPRA had been enacted in the 1970s. In closing, Ms. Harjo reiterated that the American Indian Religious Freedom Act was the important document to consider and stated she was speaking on behalf of the voiceless Indians and hoped the Committee would do well by them.

Mr. Raymond Apodaca, Chairman of the Human and Religious Rights Committee, National Congress of American Indians, agreed with the concerns voiced by Ms. Harjo and emphasized the necessity for expanding the definition of "Indian tribe" to cover viable continuing communities of Indians. Mr. Apodaca asked that traditional religions be interfered with as little as possible throughout the processes covered by the regulations. He explained, many Indian religions prohibit talking or writing about religious matters, including the naming of religious leaders. In addition, Mr. Apodaca cautioned that museums and Federal agencies need to be extremely careful to deal with the appropriate person, not just anyone who declares him/herself a spokesperson or religious leader. Ms. Harjo agreed that correct contact information must be provided to museums and Federal agencies.

Mr. Apodaca stated that although museums may be dealing with objects, Indians are dealing with their ancestors and with the means of communicating with the Creator. He continued that many tribes are faced with activities, such as dealing with the dead, they are not prepared to deal with. Mr. Apodaca added that although some comments put forth by members of the audience may have been offensive, they would not have been necessary if human beings were treated as human beings. He apologized for the comments but added they resulted from frustration with the system and the situation. Mr. Apodaca asked the Committee and the museum community to remember history and try to understand why the tribes feel the way they do.

Mr. Tim Mentz, Sr., Tribal Council member from the Standing Rock Sioux, Fort Yates, North Dakota, told the Committee that a majority of the people on his reservation did not want to be recognized by the BIA. Mr. Mentz asked the Committee to seriously consider every decision regarding the regulations because they affected every tribe in the U.S. He said the discussion was creating conflicts between tribes where none existed. Ms. Naranjo responded that although she was unable to shed her "puebloness", she tried very hard to represent all tribes in all her dealings as a Committee member.

"Native Hawaiians" [§10.2(a)(10)]. Mr. Monroe questioned the inclusion, throughout the regulations, of Native Hawaiians under the general category of Indian tribes. He felt it would be more appropriate, as Native Hawaiians were never organized as tribes, to add "and Native Hawaiian organization" wherever the regulations refer to "Indian tribes". Mr. Walker agreed and noted that subsuming Native Hawaiians into the definition of Indian tribe would deprive them of the flexibility afforded them by the broad statutory definition of Native Hawaiian. Mr. McKeown asked Ms. Craig if Alaskan Natives liked being referred to as Indian tribes. Ms. Craig agreed with Mr. Monroe and Mr.

Walker that Native Hawaiians should be noted separately from Indian tribes in the regulation's wording because NAGPRA specifically identified Native Hawaiians. She added, although so-called Eskimos do not appreciate being categorized as Indians and would rather be referred to by ethnic groupings such as Inupiat and Yupik, they have resigned themselves to being referred to as Indian tribes because national legislation has used that wording. Ms. Naranjo stated that groups of people should be referred to by names of their choosing. Mr. McKeown questioned the feasibility of replacing all references to "Indian tribes" with "Indian tribes, Native Alaskan villages and corporations and Native Hawaiian organizations" due to the confusion which may result from such verbiage. The Committee decided to leave the wording as written.

"Native Hawaiian Organization" [§10.2(a)(11)]. Mr. Monroe asked why this definition had not been changed in light of several recommendations in the comments. Mr. McKeown responded that several commentors had recommended inserting a requirement that Native Hawaiian organizations have a majority of Native Hawaiian members. He explained that the legislative history showed such a requirement was not intended by Congress, since an earlier House version of the bill had included such a provision but the final statute did not. Thus, Congress had considered the requirement and decided against including it in the definition.

"Indian Tribal Official" [§10.2(a)(12)]. Mr. McKeown proposed amending the definition to read "means the principle leader of an Indian tribe or the individual officially designated by the governing body of an Indian tribe or as otherwise provided by Tribal code, policy, or procedure as responsible for matters relating to these regulations." Mr. McManamon explained some tribes do not have codes or written documents which declare exactly who has authority to deal with certain issues. The important point of the change was that it left the decision making process to the tribe. Mr. Haas questioned how a museum official would know what procedure a particular tribe used and asked that the phrase "established tribal code, policy or procedure" be included to provide minimum additional guidance.

"Lineal Descendant" [§10.2(a)(14)]. Mr. McKeown recommended the definition be modified to include the possibility of tracing ancestry by "the common law system of descendance" as well as by means of a traditional kinship system. The Committee agreed.

"Human Remains" [§10.2(b)(1)]. Mr. Monroe brought up the feasibility of determining if portions of human remains were freely given. In his opinion, the regulations should not make such impossible demands. Mr. Sullivan reminded Mr. Monroe that the language came from Committee discussions at the Fort Lauderdale meeting. Mr. Monroe agreed but suggested the inclusion of modifying language. Mr. Hanslin suggested the phrase, "remains that may reasonably be determined to have been freely given". Mr. Walker and Mr. Sullivan approved of the wording because it gave tribes and the Committee a legal position to recommend punishment if a museum or agency attempted to evade the law.

"Associated Funerary Objects" [§10.2(b)(3)]. Mr. Monroe remarked on one comment concerning the addition of "or near" to the statutory definition. Mr. McManamon responded that the term had been added after discussion at a previous Committee meeting where it had been agreed that in some burial practices objects were not necessarily placed with a body but near it. Mr. Tallbull agreed and explained that at the time of death the Cheyenne place a man's weapons and medicine bundles at some

distance from his grave. The Committee concurred that the reasoning behind this addition was still sound.

"Sacred Objects" [§10.2(b)(5)]. Mr. Monroe questioned the addition of the word "current" to the statutory definition. The Committee decided to follow statutory language and remove the word.

Ms. Naranjo questioned inclusion of the phrase "or function in the continued observance or renewal of such ceremony" in the regulatory definition. She felt, and Mr. Walker agreed, that for an object to be considered sacred by a tribe, it should be needed for a religious ceremony, not used to reclaim their culture by reinvigorating the ceremonies. Mr. McKeown responded that the phrase was drawn from the House Committee report and continued that the report provided additional clarification of Congressional intent by stating that "the Committee recognizes that the practice of some ceremonies has been interrupted because of governmental coercion adverse societal conditions or the loss of certain objects through means beyond the control of the tribe at the time. It is the intent of the Committee to permit traditional Native American religious leaders to obtain objects as are needed for the renewal of ceremonies that are part of their religions." Mr. Tallbull agreed that in certain circumstances, such as the return of a medicine wheel or the reburial of a skeleton, renewal ceremonies were necessary. He also explained that some tribes hold annual ceremonies to renew their medicine bundles, replacing certain physical parts and reintroducing the bundle to the tribe's ritual system so that the system is in balance again. Mr. Monroe repeated he wanted to be clear on the Committee's opinion because some tribes felt it was appropriate to have an object repatriated in order to restore a ceremony which had been discontinued but some museums were concerned because such action could set a precedent for inappropriate repatriation claims. He explained that the concept of "renewal" had been a subject of deep contention during the drafting of the legislation and the word had been omitted from the statute for that reason. Mr. Monroe encouraged the use of language which allows repatriation of objects for renewal of practices which have clear historical precedent, even if they are not performed at the present time, because that was the intent of the law. Ms. Naranjo agreed.

Ms. Craig spoke about Alaskan religious beliefs in which the traditional religions and Christianity coexist. Sometimes the beliefs have been modified in order to fit into the majority's system. She wanted it made clear that "traditional religion" needed to be defined from the Native perspective so as not to impose conflicts. Mr. Tallbull agreed.

"Cultural Affiliation" [§10.2(c)]. Mr. Monroe proposed adding the following line to the definition: "Cultural affiliation may be reasonably concluded when the preponderance of geographical, kinship, biological, archeological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion supports such a conclusion." The Committee concurred.

"Tribal Lands" [§10.2(d)(2)]. Mr. McKeown recommended that the definition be amended to delete the phrase "excluding privately owned lands", and adding "(iv) The regulations shall not apply to Tribal lands to the extent that any particular action authorized or required hereunder would result in a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution." The Committee agreed to delete the phrase "excluding privately owned lands."

Mr. Monroe asked for an explanation of the section regarding the Fifth Amendment. Mr. Hanslin explained that statutory language covered "all lands which are within the exterior boundary of any Indian Reservation." This definition contradicted other statutory language which made clear that no takings were implied. The proposed regulations had excluded all privately owned lands within a reservation's exterior boundaries. However, Mr. Hanslin continued, one of the comments had argued that certain actions, such as the repatriation of human remains, would not result in a taking even if applied to private lands since there can be no property interest in human remains. The present draft had been changed to focus more narrowly on possible instances of Fifth Amendment takings such as the repatriation of individually owned sacred objects. Common law in many states would hold that sacred objects found on private land belong to the land owner. A taking would occur if the object had to be turned over to a tribe.

Mr. McManamon added that in reviewing the comments he had come to realize that there was a greater possibility for a taking to occur during property development. The proposed definition of "tribal lands" allowed a tribe to make all the decisions with regard to what happens to objects and human remains. A tribe could decide, on otherwise private land, that it did not want objects disturbed. The owner could then have an argument that there was a taking of his/her right to get the full benefit of the property. Mr. McManamon concluded the revised definition was an attempt to deal with this possible problem.

Mr. Monroe asked who would determine if a taking had occurred. Mr. Hanslin replied that the court would be responsible for making such a determination.

Mr. Monroe stated that one of the commentors argued that the statute clearly stated that tribal lands include all lands within the exterior boundary of Indian reservations and the inclusion should be maintained because landowners cannot own human remains. In addition, the Supreme Court had recognized tribal jurisdiction over non-Indians where their conduct effects the health and welfare of the tribe. Mr. Hanslin agreed that these arguments could be followed up to the point when a Fifth Amendment taking occurs. He explained that the proposed revision agreed with the stated arguments except in instances where tribal control over a site or the contents therein would constitute a taking.

Mr. McManamon asked for clarification from Mr. Hanslin regarding the status of lands held in trust by the United States that are outside the boundaries of an Indian reservation. According to the proposed regulations, would these lands be included as "tribal lands" under the concept of dependent Indian communities? Mr. Hanslin responded that such lands would probably be considered as Federal lands because the U.S. government owns them in trust for Indian tribes. Mr. McManamon pointed out that Indian tribes would have less control over lands held in trust if they are considered to be Federal lands.

"Possession" [§10.2(e)(5)]. Mr. McKeown proposed adding the following sentence: "Generally, a museum or Federal agency would not be considered to have possession of human remains or cultural items on loan from another individual, museum, or Federal agency."

"Control" [§10.2(e)(6)]. Mr. McKeown proposed adding the following sentence: "Generally, a museum or Federal agency that has loaned human remains or cultural items to another individual,

museum, or Federal agency is considered to retain control of those human remains or cultural items for purposes of these regulations."

Mr. Monroe read one comment which requested a return to statutory language for the definitions of "possession" and "control". Mr. Hanslin responded that the changes had amplified the statutory meaning. He continued that a literal reading of the original language would have forced museums and Federal agencies to repatriate objects that had been left in their possession instead of only the objects which they had a legal right to repatriate. The literal reading would have increased the problem of Fifth Amendment takings. Mr. Monroe replied that he was skeptical of Mr. Hanslin's interpretation when two other lawyers had a different reading of the problem and questioned whether Mr. Hanslin was working for the Committee or for the Department of the Interior. Mr. Hanslin and Mr. McManamon explained the Committee was free to take Mr. Hanslin's advice or not, at their discretion. Mr. Hanslin explained that the rewritten version of the regulations said, essentially, that museums must have sufficient legal interest in an object to be able to transfer the object. Congress had tried to address the problem through the definition of right of possession. The comment by Mr. Jack Trope and Mr. Walter Echo Hawk resolved the problem by saying a museum has possession unless it results in a taking of property. Mr. Hanslin felt the amended language stated the situation more clearly. Ms. Naranjo said she worried about Mr. Trope's comment because it implied museums had an "out" if they claimed not to possess objects. Mr. Hanslin responded that, in his opinion, the regulations did not provide an "out" for museums, the statute did.

Mr. McManamon asked the Committee for examples where museums have objects in their possession which they do not own. Mr. Sullivan responded that a museum may feel it does not have clear title to an object and would deny a repatriation request out of fear that someone with a greater interest would bring legal action. In addition, an object may have been donated with conditions which repatriation would break. The museum would need to evaluate the conditions before agreeing to repatriation. Mr. Sullivan said it did not seem to him that the regulatory language allowed museums to invent reasons for not complying in the way that Mr. Trope and Mr. Echo Hawk alleged. Mr. Monroe added that objects on long-term loan from private individuals or held in a museum's care but owned by a Federal agency are not owned by the museum. Mr. Monroe recounted a situation where a museum acted as a go-between when a tribe requested the repatriation of an object on loan to the museum. The Committee decided that the rephrasing did not present any new loopholes and agreed to retain it.

Mr. Wozniak asked for a definition of the word "repatriation" because its use in the statute implied the transfer of property rights. Mr. Monroe cautioned that NAGPRA should not be seen as a property rights issue but rather, as concerning people and the creation of a better relationship between Native Americans, museums and the scientific community. He felt that any attempt to define repatriation would limit the range of NAGPRA.

*§10.3 Intentional Excavations*

Mr. McKeown proposed that the following sentence be added immediately before the last sentence of §10.3(c)(2): "Written notification should be followed up by telephone contact if there is no response in 15 days." The Committee concurred.

Mr. Monroe asked for an explanation of when a planned activity would be subject to review under Section 106 of the National Historic Preservation Act as referred to in §10.3(c)(3). Mr. Hanslin replied that any action which is assisted by Federal money, or which requires a Federal permit, and has the ability to affect cultural resources, is subject to the provisions of Section 106. Thus, there would be a great deal of overlap between NAGPRA and Section 106 for Federal undertakings conducted on Federal or tribal lands.

Mr. McKeown recommended adding a sentence under §10.3(c)(4) to recommend that Indian tribes should take appropriate steps to: "(i) Ensure that the human remains and cultural items are excavated or removed in accordance with §10.3(b)(1), and . . ." The original phrase would be renumbered as §10.3(c)(4)(ii) and changed to read: "make certain that treatment and disposition of any human remains or cultural items excavated or discovered as a result of the planned activity are carried out in accordance with their ownership as described in §10.6." The Committee concurred.

*§10.4 Inadvertent Discoveries*

Mr. McKeown proposed changing the first sentence of §10.4(b) to: "Any person who knows or has reason to know that he or she has discovered human remains or cultural items on Federal or Tribal lands after November 16, 1990, must provide immediate telephone notification of the discovery, with written backup..." Mr. Hanslin explained that this change made it clear that the discoverer, as opposed to a bystander, has the responsibility to notify the appropriate authorities. Mr. McKeown explained that immediate telephone notification would provide a Federal land manager with the time necessary to identify the proper Indian tribal representatives prior to the receipt of formal, written notification and the beginning of the required 30-day consultation period.

Mr. Monroe referred to several comments that identified the one-working-day notification period required in §10.4(c) as being impractical. Mr. Sullivan reminded him of the recommended change in the previous section that required immediate telephone notification followed up by a letter, the receipt of which triggers the one-working-day deadline. Mr. Monroe asked what would happen if, after 30 days, there was no response. Mr. Hanslin replied that the statute only stops the excavation progress for 30 days so, if there was no response in 30 days, the excavation could continue. Mr. McManamon explained the finite period of inactivity was the reason the regulations had been structured to encourage proactive consultation and the development of a plan prior to excavation which could be followed in the case of a discovery. Mr. Hanslin added that in reality, the excavation probably would not resume in 30 days because other Federal laws could also apply. Ms. Craig reported that she had heard reports that construction companies might stop reporting discoveries because continued 30-day halts would cost them money. Mr. Ball said that, in his experience, companies often isolate a contested site and continue their work in other areas while the consultation process progresses.

Ms. Deborah Osborne, from the Federal Energy Regulatory Commission, asked how to proceed if, 30 days after an inadvertent discovery, no approved written plan of action is in place. Mr. McManamon agreed that this question had been raised by a number of commentors and promised to see if the section could be clarified.

Mr. Wozniak asked for guidelines to determine the "area of discovery", where project activity must be suspended, as stated in §10.4(c). In addition, Mr. Wozniak questioned the necessity for notifying

tribes when a discovery had been made anywhere on their aboriginal land claim as too broad a spread of cultural affiliation.

*§10.5 Consultation*

Mr. McKeown recommended inserting the following sentence before the last sentence in §10.5(b): "The notice shall propose a time and place for meetings or consultation to further consider the inadvertent discovery or intentional excavation, the Federal agency's proposed treatment of the human remains or cultural items that may be excavated, and the proposed disposition of any excavated human remains or cultural items." The Committee concurred.

Mr. McKeown proposed retitling §10.5(f) "Comprehensive agreements." Mr. McManamon explained that one of the statute's primary goals was improving relationships between Indian tribes and Federal agencies. In his eyes, comprehensive agreements were a way to bring people together and, hopefully, create more positive relationships through the continual discussions necessitated by such agreements. The regulations had not been drafted with the thought that Federal agencies would draw up *pro forma* documents and continue with business as usual. Mr. Walker and Ms. Naranjo asked that examples of agreements be included. Mr. McKeown reminded the Committee that Appendix E of the regulations had been reserved for such an example. Mr. McManamon described a hypothetical agreement which laid out the steps to follow and the individuals to contact when human remains or cultural items were discovered. In his view such an agreement could provide information to the Federal agency and to the tribe such that the Federal agency would know what to do and the tribe would be able to expect certain actions. Mr. Tallbull agreed that in such a situation the tribe would be able to monitor compliance with the plan.

Ms. Lefthand stated that face-to-face consultations were necessary because tribes had been hurt by Federal agencies whose idea of consultation was a letter. She asked how to trust someone you had never seen before. Ms. Naranjo agreed that face-to-face consultation was very important, especially for inspection of objects and repatriation requests. Initial contact, she felt, could be handled through telephone calls or letters but, as the process progresses, face-to-face meetings become imperative.

*§10.6 Ownership*

Mr. McKeown recommended amending the requirement for publication of general notices of the proposed disposition in a newspaper of general circulation to include provisions for publication "if applicable, in a newspaper of general circulation in the area(s) in which culturally affiliated Indian Tribes now reside." Such a provision would ensure that culturally affiliated Indian tribes were aware of inadvertent discoveries in their former territories. The Committee concurred.

Mr. Wozniak asked for clarification of what information would be published in a Notice of Intent to Repatriate. In addition, he questioned the propriety of requiring a notice of proposed repatriation to be published in a general circulation newspaper as such a notice would alert pothunters to forthcoming opportunities and call undue attention to the repatriated objects. He suggested directly contacting all tribes which had been consulted. Mr. McManamon responded that the published notice was intended to notify all lineal descendants who may or may not have been contacted previously and it should

announce an impending repatriation without mentioning reburial. Mr. Sullivan commented if the notice mentioned the discovery site that would give pothunters a location to search. Mr. McKeown added that the alternative would risk repatriation to the wrong people.

*§10.8 Summaries*

Mr. McKeown proposed changing the term "undertakings" in §10.8(a) to "actions." Mr. Walker asked for clarification, stating that the changed language did nothing but scare a non-lawyer. Mr. McManamon explained that the term "undertakings" had a specific meaning within the context of Section 106 of the National Historic Preservation Act. A less specific term was needed for the NAGPRA context. Mr. McManamon stated he was not entirely happy with the change as it begged the question of who decides if an activity falls under NAGPRA. He explained he had heard reports that some U.S. Army Corps of Engineers districts were applying the principles of NAGPRA to activities on non-Federal lands. It is a question the Department of the Interior will have to look at.

Mr. Sullivan requested clarification regarding the applicability of civil penalties to museums that did not complete summaries by the November 16, 1993 deadline stipulated in §10.8(c). Mr. McManamon stressed that the section of the regulations regarding civil penalties had been drafted and agreed that the Committee would need to address the issue of penalties at an upcoming meeting.

Mr. McKeown recommended the addition of the following sentence under §10.8(d)(2): "Consultation may be initiated with a letter, but should be followed up by telephone or face-to-face consultation." He also proposed including the following as the second sentence under §10.8(d)(3): "A copy of the summary shall also be provided to the Departmental Consulting Archeologist." The Committee concurred.

Mr. Haas was concerned with the feasibility of museums identifying traditional religious leaders for consultation. Ms. Naranjo indicated that some Pueblos did not want museums to contact religious leaders. Mr. Tallbull concurred, stating that the Northern Cheyenne have two governmental structures, the formally elected tribal officials and a traditional governmental of 44 chiefs. Some museums have consulted with traditional chiefs without notifying the tribal government. This has caused confusion. Mr. McManamon explained that current wording was designed to reflect the contentious nature of religious and political leadership in some tribes by allowing museums some latitude in how they identify traditional religious leaders. Mr. Haas suggested subsuming §10.8(d)(ii) and (iii) under §10.8(d)(iv) so that a museum's request for the names of traditional religious leaders, where appropriate, would be a part of its total request for recommendations on how the consultation process should be conducted.

Ms. Naranjo voiced her concern with the requirement in §10.8(e) to provide item-by-item lists to the Departmental Consulting Archeologist. She felt the primary relationship intended by the statute was between museums and Indian tribes. Ms. Naranjo also worried that sensitive information held by the Departmental Consulting Archeologist might get into the wrong hands through a Freedom of Information Act request. Mr. McManamon replied that the lists are necessary to allow the Committee to monitor the repatriation process as well as providing a central location for information which may be useful to other tribes and/or museums. Mr. McManamon added that the language could be changed to ensure that if sensitive information was included as part of the decision making process it not

become part of the public record. He suggested deleting §10.8(e)(1-8) and revising the next sentence to read: "The notice of intent to repatriate shall describe the unassociated funerary objects, sacred objects, or objects of cultural patrimony being claimed in sufficient detail so as to enable other individuals or Indian tribes to determine their interest in the claimed objects."

Mr. Haas inquired as to how long a museum should wait after the publication of a notice in the *Federal Register* before it proceeded to repatriate human remains or cultural items. Mr. McManamon explained that §10.10 contained the statement that repatriation could take place 30 days after the date the notification was published. Mr. Haas suggested that the information also be included at the end of §10.8(e). Mr. Monroe objected to the 30 day waiting period, stating that the statute was clear that nothing should prevent repatriation. He referred to the comment by Mr. Jack Trope and Mr. Walter Echohawk in which they argued that repatriation should occur immediately and not be delayed. Mr. Haas and Mr. Sullivan responded that failure to publish such a notice would be disastrous to the entire process. Mr. Haas explained that the Field Museum was currently involved in the repatriation of a sundance wheel to the Northern Arapaho. The museum's records indicated that the wheel originated on the Wind River Reservation, home of the Northern Arapaho. The museum consulted with the Arapaho Business Council, the Council of Ceremonial Elders from the Northern Arapaho, members of the Northern Arapaho Sun Dance Ceremony, members of the Northern Arapaho Tribal Council and a member of the Southern Arapaho Tribal Council. All of the consultants confirmed that the wheel should be repatriated. However, during the process of receiving approval for repatriation from the museum's Board of Trustees, members of the Arapaho community, a keeper of the sundance wheel, a chief of the Sun Dance Ceremony, and a keeper of the Southern Arapaho sundance wheel contacted the museum and urged them not to repatriate. An additional objection was raised by the Southern Arapaho following publication of the Notice of Intent to Repatriate in the *Federal Register*. Mr. Haas felt the 30 day waiting period had provided the Southern Arapaho community with the time necessary to discuss the situation and voice their objection.

Mr. Wozniak questioned the need to summarize archeological surface collections as it was probable that they would not contain sacred objects or objects of cultural patrimony. Mr. Monroe felt it would not be safe to assume, just because the materials were collected from the surface, that they were not sacred or objects of cultural patrimony. Mr. Haas counseled following the directives in §10.8 but to realize that museums would not be able to provide the same amount of detail for archeological collections as they could for ethnographic collections.

*§10.9 Inventories*

Mr. McKeown recommended replacing the term "undertaking" in §10.9(a) with "action." The Committee concurred.

Ms. Naranjo asked how long is a reasonable time for a museum to wait for a response. She explained that some Indian tribes do not respond to letters, in addition, some letters do not reach the appropriate person, so a follow-up telephone call might get a better response. But, she questioned how much more beyond a letter and a phone call would be reasonable to expect.

Mr. Monroe requested that the first line of §10.9(b)(2) be rewritten as follows: "Museum and Federal agency officials shall begin inventory consultation as early as possible, no later than the point in the

inventory process at which investigation into the cultural affiliation of human remains and associated funerary objects is being conducted." Mr. Monroe remarked that a number of responses concerned the definition of consultation and he felt that point needed some discussion and possibly the inclusion of minimum parameters. Mr. McManamon responded that he felt, from his work with other regulations, that the proposed regulations dealing with consultation during excavation were among the most detailed in trying to describe how to go about consulting. Mr. Monroe was concerned with the regulations dealing with consultation during the summary and inventory process. He wanted to add more detailed guidelines for museums and tribes to forestall museums writing a single letter and letting the process die. Ms. Craig said the small villages in Alaska would probably contact the larger Native corporations to find out what to do with a museum notification. She continued with a recommendation for museums to send copies of everything mailed to a village to the central Native corporation as well.

Mr. McManamon raised the possibility of requiring face-to-face consultation but both Mr. Monroe and Mr. Walker said that there would be times when a face-to-face consultation would not be possible and such a requirement would be a burden to both tribes and museums. Mr. Tallbull responded that a law may require consultation but the parties don't have to listen to one another. He said some Indians feel that Federal agencies simply "go through the motions" of consultation without any intention of considering the other party's side. This feeling has made some tribes reluctant to participate in consultations. Ms. Craig added that in some instances face-to-face consultation with elders would be the only means of identifying some sacred and burial objects. Mr. Monroe wanted to clarify that consultation was construed to mean a dialogue. Mr. McKeown proposed adding a sentence to read: "Consultation may be initiated with a letter, but should be followed up by telephone or face-to-face dialogue." The Committee agreed. Mr. Sullivan also suggested the inclusion, at the end of the regulations, of a sample consultation procedure. Mr. McManamon agreed that the Park Service would draft sample procedures for review by the Committee.

Ms. Naranjo referred to one of the comments that recommended the inventory of culturally unidentified human remains and cultural items identified in §10.9(d)(2) be publicized by tribal media. Mr. McManamon recommended against including such a requirement in the present section, as §10.11 had specifically been reserved to outline requirements for such items. Including a requirement in this section would unduly tie the Committee's hands when the time comes for their recommendations to the Secretary.

Mr. Wozniak asked what sort of electronic format, as stated in §10.9(e)(4), would be required for the transmittal of information to the Department of the Interior. Mr. Mcmanamon replied the language as written was rather strong and a change would be considered to allow for leeway.

Mr. Monroe recommended that "an extension" referred to in §10.9(f) be changed to "one extension" to make it clear that continued extensions would not be possible.

Mr. Wozniak voiced concern that §10.8 and §10.9 required Federal agencies to ensure all requirements were met for collections which originated on lands controlled by them. Mr. Wozniak pointed out that a large percentage of the materials were collected as a result of research initiated and carried out by the universities and museums which now hold the collections. Mr. Wozniak asked that shared responsibility for these collections be considered.

*§10.10 Repatriation*

Mr. Monroe objected to the requirement in §10.10(b)(2) that repatriation of human remains and associated funerary objects not occur until a Notice of Inventory Completion had been published in the *Federal Register*. In Mr. Monroe's opinion, that requirement was contrary to other provisions in the statute. He was concerned that museums and agencies would delay repatriating remains until they had completely finished and published all their inventories. Mr. McManamon replied that he felt §10.9 had made it clear that museums and agencies were encouraged to produce inventories on parts of their collections, especially on the parts where they had more information.

Ms. Naranjo raised objections to the exception for scientific study "commenced prior to receipt of a request for repatriation" in §10.10(c)(1). Mr. Sullivan noted that the particular statement was even stronger than the statutory language. Mr. McKeown added that the revision had been made based on discussion at the Fort Lauderdale meeting. Mr. Walker and Mr. Monroe agreed it was a tough standard. Mr. Haas asked if comments had been received regarding the section. Mr. McKeown replied that three commentors recommended deleting the section. Mr. Monroe and Ms. Naranjo recommended removing the phrase as there had been an objection to it in the comments.

Mr. Tallbull asked whether the benefit to Indians might be considered in defining whether a study was of "major benefit" to the United States. Numerous studies have been conducted on Federal and Indian lands and he didn't recall ever seeing the results made available to a reservation library. Mr. Haas suggested including a statement in the Preamble indicating that the Committee considered the "major benefit" standard to be a very high one. Mr. Tallbull also requested that the information gained from any scientific study be made available to Indians.

Ms. Osborne asked who would decide what constituted a scientific study of major benefit to the United States. Mr. McManamon responded that, at this point, there was no definition of "major scientific importance" and he felt such situations would be rare. He suggested consultation if an agency believed a study to be crucially important. If no agreement could be reached, the tribe and the agency could present the situation for dispute resolution.
Ms. Naranjo requested that the final phrase in §10.10(c)(2) be changed from "proper recipient" to "most appropriate recipient" to more closely reflect statutory language. Mr. Sullivan proposed changing the second line of the section to read: "In such circumstances, the museum or Federal agency may retain the human remains and cultural items..." The Committee concurred with both changes.

Mr. Haas cited several comments requesting the return to statutory language in §10.10(c)(3). Mr. Hanslin explained that the statutory language had been changed for legal considerations. The United States Claims Court referred to in the statute no longer exists and has been replaced by the Court of Federal Claims, a statutory court. But, the Supreme Court is the only court which can decide a taking and Congress cannot, by writing a law, decide that a statutory court has priority over the Supreme Court. Mr. Sullivan said the Committee simply wanted to make clear what a Fifth Amendment taking was. Mr. Hanslin agreed and suggested "as determined by the Supreme Court of the United States."

Mr. Daniel Weiner, outside counsel for the American Museum of Natural History, New York, N.Y., commented that the phrase might confuse people and make them think such a case would have to go to the Supreme Court. Mr. Hanslin responded with the phrase, "a court of appropriate jurisdiction upon application of established Federal case law."

Mr. Sullivan requested a separate section for the last sentence in the paragraph of §10.10(c)(3) because he felt it was a very important concept and had come directly from the statute. Mr. McKeown responded that the structure of the section would not fit if the sentence was made §10.10(c)(5), but that some other revision could be worked out emphasize the sentence.

Mr. McKeown proposed inclusion of a statement to be renumbered §10.10 (e) indicating that museum or Federal agency officials should inform the recipients of repatriations of any known past treatment of the objects that might represent a potential health hazard to persons handling the objects. The Committee concurred.

Mr. McKeown proposed including a statement under §10.10 (e) specifying the potential applicability of various endangered species legislation to the repatriation process. Mr. Monroe questioned the addition of such a blanket statement requiring compliance without understanding the affect on NAGPRA. He was concerned that the addition would create confusion and suggested the regulations provide either an in depth analysis of the Federal wildlife laws and their application to NAGPRA or simply state that such laws may be relevant to certain objects repatriated under NAGPRA. Mr. Walker agreed and specifically noted that objects repatriated to northwest coastal Indian tribes might be covered by the Marine Mammal Protection Act. Ms. Craig agreed and remarked that Native Alaskans also made objects from marine mammal parts.

Mr. Sullivan described the Heard Museum's interaction with the Fish and Wildlife Service. Delegates from the Crow Nation in Montana had identified a medicine hoop, containing eagle parts, as a sacred object and requested its return. The Heard Board of Trustees agreed to repatriate the medicine hoop but asked if the museum could be accused of trafficking in endangered species. The question was resolved with a phone call to the Fish and Wildlife Service.

Ms. Marcia Cronan and Mr. Frank Shoemaker, Investigative Special Agents for the U.S. Fish & Wildlife Service, were asked to address the Committee. Ms. Cronan explained that there were so many Federal wildlife statutes which may apply to Native American cultural objects, due to the inclusion of protected animal parts, that the easiest way for a museum to be sure they were in compliance would be to call a central contact person for the Fish & Wildlife Service and get the information. Mr. Monroe and Mr. Haas asked if the Service was prepared to deal with the thousands of questions they might receive from small museums and historical societies whose collections include marine mammal ivory or bone. Ms. Cronan replied it would be to a museum's advantage to ask the question of the Service rather than be in violation of the Act. Mr. Monroe asked if the Service had ever prosecuted a museum. Ms. Cronan replied that she could not think of a museum in the Eastern Region, where she works, which had deliberately violated a Fish & Wildlife statute. Mr. Monroe asked if Native Americans were exempted from some of the provisions in the Acts. Ms. Cronan agreed that in some circumstances they were.

Mr. Weiner asked what the per unit cost of permits would be. Ms. Cronan replied the Service needed to look into the charges but she expected something could be worked out where one fee would cover all repatriated objects. Ms. Pemina Yellow Bird, member of the Three Affiliated Tribes, Fort Berthold Reservation, North Dakota, commented that the objects involved were not black market objects, they were the belongings of the dead. She disagreed with "white man's laws" regulating Native American cultural objects and she did not feel native peoples should need permits to have their ancestors returned. Ms. Cronan replied that the issue of a tribe obtaining a permit for cultural objects may not occur but, she simply wanted to make it known that the Service was available to answer questions should any museum, agency, or tribe have one. Mr. Walker asked if Fish & Wildlife intended to issue blanket waivers covering all repatriated materials. Ms. Cronan did not know of any intent at the current time but she agreed it should be looked into. The Committee recommended that information concerning possible Fish & Wildlife statute violations be placed in the Preamble to notify museums and agencies of the potential for problems.

Mr. McKeown recommended inclusion of a statement under §10.10 (e) indicating that museum or Federal officials, at the request of an tribal official, could take steps to ensure that information of a particularly sensitive nature is not made available to the general public. The Committee concurred.

*§10.14 Lineal Descent and Cultural Affiliation*

Mr. McKeown recommended replacing the "must" in §10.14 (c)(2) with "may include, but is not limited to." The Committee concurred.

Mr. McKeown recommended inclusion of a statement under §10.14 (d) indicating that findings of cultural affiliation should be based upon an overall evaluation of the totality of circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record. Mr. McKeown explained that the proposed language was verbatim from the House Report per the comments of Mr. Echo Hawk and Mr. Trope. The Committee concurred.

*§10.15 Repatriation Limitations and Remedies*

Ms. Naranjo questioned the use of the phrase "timely claim" in the second sentence of §10.15 (a). Mr. Hanslin reminded her that the Committee developed the phrase at the Fort Lauderdale meeting as a means of identifying an end of the repatriation process. He continued that it only applied in a situation where repatriation is scheduled and a dispute occurs. In such a situation the protesting party has at least 30 days after a Notice of Intent to Repatriate or a Notice of Inventory Completion is published in the *Federal Register* to complain.

Mr. Sullivan questioned the change in the third sentence in §10.15(a) from "may" to "shall" so that the resulting sentence read "If there is more than one claimant, the human remains and/or cultural items shall be held by the responsible museum . . ." Mr. Sullivan felt that the use of "may" left open the possibility of a third party holding the object during the dispute resolution. Mr. Haas asked if the choice of "may" left museums open to accusations of not paying attention to repatriation claims. After the Committee members discussed possible alternative phrasing it was decided to stay with the statutory language.

**PUBLIC COMMENT**

Mr. Frank Wozniak, NAGPRA Inventory Coordinator for the Southwestern Region of the U.S. Forest Service, asked a number of questions regarding specific points in the regulations. His comments have been included under the appropriate regulatory reference.

Ms. Naida Lefthand, Assistant Director of the Kootenai Culture Committee on the Flathead Reservation in Montana and delegate from the Confederated Salish Kootenai of Pablo, Montana, commended the Committee on the time and effort they had expended trying to formulate the regulations. Ms. Lefthand concluded by asking the Committee members to keep their minds and heart open and to remember that the legislation is important to Native peoples.

Ms. Pemina Yellow Bird, member of the Three Affiliated Tribes from Fort Berthold Reservation, North Dakota and member of the North Dakota Inter-Tribal Reinterment Committee, spoke on behalf of the tribal peoples of North Dakota. Ms. Yellow Bird stated the proposed regulations deleted or negated many of the protections and sanctions contained in NAGPRA's statutory language, specifically she pointed to the changes in the definition of "Indian tribe" and "tribal lands." In addition, she complained that the tribes of North Dakota had little opportunity for input and no influence over the drafting of the regulations. Ms. Yellow Bird asked why legal counsel representing native peoples had not been present, in the same capacity as the Solicitor's Office representative, at Committee meetings and during the drafting of the regulations to protect the interests of native peoples. Ms. Naranjo and Mr. Monroe explained that tribal lawyers had supplied input through their comments on the proposed regulations and other regulation drafts as well as through their presence at Committee meetings and, although the Committee was concerned about the lack of nNtive legal counsel, they never felt the Solicitor's Office was trying to hoodwink the Committee. Mr. McManamon explained the Solicitor Office answered legal questions for the Departmental Consulting Archeologist's office, the office responsible for assisting the Committee. He added, if the Committee felt it needed additional assistance, the Secretary could consider the request. Ms. Yellow Bird requested the comment period be extended to allow opportunity for all tribes to review the issues raised at the meeting. Ms. Yellow Bird reminded the Committee that it had a Congressional mandate to carry out the requirements set forth in NAGPRA and concluded her three days of remarks by asking that the Committee members open their minds and hearts to hear Indian representatives speaking about protection of the rights of the ancestors. Ms. Naranjo thanked Ms. Yellow Bird for her comments.

Ms. Donna Augustine, member of the Micmac Tribe of New Brunswick, Canada, member of the Task Force for Museums and First Peoples in Canada and a representative of the Micmac Nation in Aroostook County, Maine, felt native peoples had not been notified and were not aware of what was happening with NAGPRA legislation. Ms. Augustine added that native people need help to get their ancestors back and she regretted the necessity of continually asking other people to return the ancestors. Ms. Naranjo agreed wholeheartedly with the need to bring the ancestors back home.

Mr. Tim Mentz, Sr., member of the Tribal Council, Standing Rock Sioux Tribe, Fort Yates, North Dakota, cautioned Committee members that they were not acting from their hearts. Ms. Naranjo responded that her community of Santa Clara was a very small, very strong community with a deep sense of spirituality and, although she was not a religious leader, she was very, very spiritual. In

addition, she wanted to reassure Mr. Mentz and other members of the public, that spirituality was very important to all the Committee members. Ms. Craig agreed and stated she put "her heart and soul" into her work. Mr. Mentz asked which Committee members were traditional religious leaders. Mr. Tallbull responded that he had reburied many people, at great spiritual risk to himself.

Mr. Mentz felt a representative from the Solicitor's Office was unnecessary at Committee meetings because the members should search themselves for what they needed to do. And, Mr. Mentz continued, if a Solicitor's representative attended the meetings so should a Native American legal representative.

Mr. Mentz chastised the Committee members for attending a reception at which alcoholic drinks were served when the spirits of the ancestors had not yet been laid to rest and for delegating themselves the authority to interpret the statutory law to fit their own vested interests. Ms. Craig admonished Mr. Mentz for speaking harshly to elders. Mr. Mentz asked why NAGPRA was required to have guidelines and regulations when the statutory language was explicit on implementation. In addition, he did not feel the Committee had the authority to determine the outcome of the reserved sections in the regulations, he felt such a determination was up to the tribes.

Mr. Mentz concluded by requesting a meeting of the Committee at the United Tribes Educational Technical College in Bismarck, North Dakota so the Plains area of the country could be heard. Ms. Naranjo thanked Mr. Mentz for his comments and told him the Committee would consider his invitation to meet in North Dakota.

Mr. Daniel Weiner, outside counsel for the American Museum of Natural History, commented that the statute did not preclude museums from dealing with non-Federally recognized tribes. He added, the American Museum of Natural History had dealt, and would continue to deal, with tribes that are not "Federally recognized." Mr. Weiner continued that an expansion of the current definition of "Indian tribe" would cost tribes as well as museums. In response to incredulity expressed by members of the audience with regard to the possibility of tribal misrepresentations, Mr. Weiner shared with the Committee an instance of misrepresentation which occurred at the American Museum of Natural History.

Mr. Weiner concluded that museums are also watching the Committee's actions and are paying particular attention to any attempts to change statutory language. He explained the museum community holds objects in trust for all peoples and, although they fully intend to comply with the statute, they are worried that deviation from statutory language will result in litigation at the expense of cooperation. Mr. Monroe thanked Mr. Weiner for his comments.

Mr. Darrell Newell, representative of the Passamaquoddy Tribe from Maine, encouraged the members of the Committee to be true to the responsibility they had been given and follow through with the spirit of the law.

**OTHER BUSINESS**

Minutes of the February 26-28, 1993, Committee meeting in Honolulu, HI, were approved by the Committee and signed by Ms. Naranjo.

Mr. McManamon opened discussion on several issues related to implementation of the statute.

Final Regulations. Mr. McManamon proposed the Departmental Consulting Archeologist's office make changes to the revised proposed regulations as recommended by the Committee and begin the process of final Departmental approval. Mr. Haas agreed that it was time to move on to the other issues which needed the Committee's attention. Mr. Monroe did not feel the Committee had fully exercised its responsibility by reviewing each of the comments in depth. Ms. Naranjo agreed she needed to go home and digest what she had heard at the meeting. Mr. Haas asked if each Committee member could review the draft final regulations and forward their comments to the Chair so she could communicate the Committee's collective concerns to the Department. Mr. McManamon proposed that if the Departmental review process yielded any major change, the Committee might consider a special session in Washington to discuss the change with the relevant Departmental officials. He also indicated that republication of the regulations in the *Federal Register* as "proposed" might be necessary if major changes were contemplated by the Department. Mr. Monroe asked how long it might take for the Department to review the final regulations. Mr. McManamon and Mr. Hanslin responded that the process might take about six months.

Reserved Sections. Mr. McManamon outlined the process by which the previously reserved sections would be drafted, published as proposed regulations in the *Federal Register* and published as Final Regulations.

Grants. Mr. McManamon indicated that the administration's budget request for fiscal year 1994 included $2.75 million dollars for NAGPRA grants. He was not sure what figure would actually be appropriated by Congress but was hopeful that the decision would be made by October, 1993.

**CLOSING**

Mr. McManamon thanked the Committee members for the time and effort they put into this meeting. He thanked the members of the public for their comments, Mr. Hanslin for his time and advice, and Park Service staff for their assistance in planning and implementing the meeting.

Mr. Tallbull provided some closing words for the meeting. The meeting was adjourned by Ms. Naranjo at 5:15 p.m. on Wednesday, September 22, 1993.

Approved:

/s/ Tessie Naranjo
Tessie Naranjo, Chair
Native American Graves Protection
and Repatriation Committee

June 6, 1994
Date